

COMMENT I: PROPER LEGAL STANDARD

A. Statement of the Issue Addressed in the Comment

What is the proper legal standard to apply in determining whether Russia qualifies as a market-economy country under section 771(18) of the Tariff Act of 1930?

B. Summary of Comment

The question under the statute is not whether a country has made significant progress toward creating a market economy, but rather whether the record shows that the country now operates on market principles of cost and pricing structures. While Russia's old centrally planned economic system has been dismantled, that does not mean that functioning markets have replaced state controls, as is required to revoke Russia's NME status.

C. Comment

While the statute identifies specific factors that the Department is to take into account in making NME determinations,¹ the statute also provides a definition of an NME country. Under the statute, an NME country is "any foreign country that the {Department} determines *does not operate on market principles of cost or pricing structures*, so that sales of merchandise in such country do not reflect the fair value of the merchandise."² In examining the facts with respect to the statutory factors, the Department should focus on the bottom-line question under the statute -- whether the economy in Russia operates on market principles of cost and pricing structures.

Consistent with the statute, the Department declined to revoke the NME status of Russia in 1995 precisely because functioning markets were not in place, despite the significant reform that had occurred by that time. Specifically, the Department noted that Russia was "in the process of implementing extensive reforms to achieve its goal of becoming a market economy," including the "freeing of most prices in December 1991 and the privatization of most enterprises formerly within the state-planning system."³ However, the Department found that:

The Russian economy, having emerged from a centrally-planned system, is in a state of transition. Many of the state controls have been abandoned, but that does not mean that functioning markets have replaced controls. Because the evidence does not demonstrate that prices and costs in Russia adequately reflect market considerations, we cannot at this time alter Russia's designation as a

¹ Section 771 (18)(A) of the Tariff Act of 1930, as amended (the "Act"); 19 U.S.C. § 1677(18)(A) (emphasis added).

² *Id.*

³ *Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium from the Russian Federation*, 60 Fed. Reg. 16,440, 16,443 (March 30, 1995).

nonmarket economy.⁴

Similarly, in determining not to revoke Ukraine's NME status, the Department found that

While significant progress has been made in Ukraine's transformation to a market economy, under the analysis required by section 771(18)(B) of the Act, we cannot conclude that Ukraine should be treated as a market economy for purposes of the antidumping duty law. While many of the state controls have been abandoned, functioning markets have not completely replaced government controls.⁵

Thus, the Department has recognized that the issue under the statute is not whether substantial reform has occurred, but rather whether functioning markets are in place and prices and costs adequately reflect market considerations.

Furthermore, in order for the Department to apply its market-economy antidumping and countervailing duty methodologies, prices and costs in the economy in question must be market-determined. The economic environment must be one of functioning markets, in which any isolated distortions caused by government interference can be reliably and practicably quantified through a countervailing duty analysis. If functioning markets have not replaced state controls, the Department can neither apply market-economy dumping margin calculation methodologies nor perform a countervailing duty analysis without encountering distortions at multiple levels of the economy, which would render such analyses invalid.

As explained below in Comments II and III, functioning markets have not replaced state controls in Russia. Accordingly, the Department should maintain Russia's NME status for purposes of the antidumping and countervailing duty laws.

⁴ *Id.*

⁵ *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Ukraine*, 62 Fed. Reg. 61,754, 61,756 (November 19, 1997).